NO. 2001-32094

JOE SHIELDS,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
KENNITH DALE HENSLEY et al.	§	
	§	
Defendants.	§	**280TH JUDICIAL DISTRICT**

ECHOSTAR SATELLITE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

All summary judgment proof in the Exhibits and Appendix are incorporated by reference into the motion.

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Defendant EchoStar Satellite Corporation ("EchoStar"), by and through its attorneys T. Wade Welch & Associates, files this Motion for Summary Judgment pursuant to Tex. R. Civ. P. 166a and Motion for No-Evidence Summary Judgment pursuant to Tex. R. Civ. P. 166a(i), and in support states:

PRELIMINARY STATEMENT

This is a case about telemarketing calls allegedly made to Plaintiff's home which Plaintiff alleges violate Texas and Federal law, but Plaintiff admits that EchoStar itself did not make these calls, admits he has no evidence to dispute the fact that EchoStar did not authorize the calls, EchoStar did not know the calls were being made, EchoStar did not pay anyone to make the calls, and the people that made the calls were not EchoStar's agent. Moreover, the Texas statute only restricts calls to mobile phones and the Federal statute does not apply because it only regulates interstate calls, not intrastate calls.

This case has been narrowed down to one basic liability issue: were the telephone calls made "on behalf of" EchoStar. The question for this Court is: what does "on whose behalf" mean. Plaintiff's definition is absurd. According the Plaintiff's theory, if your name is mentioned in a telephone call then the call is made on your behalf.

The analogy is this: if a person supported Judge Lindsay for re-election to the 280th Judicial District and that person decided to make telemarketing calls asking people to vote for Judge Lindsay for re-election, even if that person had not been asked to make those calls, under the law are those calls being made "on behalf of" Judge Lindsay, and if those calls somehow violated the Federal or Texas statute, would Your Honor be liable for a $500 civil penalty for each telephone call made? Plaintiff would say "yes" because it mentions Your Honor's name.

This summary judgment motion is about drawing a line. This Court should rule that a telemarketing call is not made "on behalf of" an entity unless that entity asks for the telemarketing call to be made.

BACKGROUND

EchoStar is a multi-channel video provider, providing video, audio, and data services to customers throughout the United States, Puerto Rico, and the U.S. Virgin Islands via a Direct Broadcast Satellite ("DBS") system. As part of that business, EchoStar uses high-powered satellites to broadcast, among other things, movies, sports, and general entertainment programming services to consumers. EchoStar operates its DBS service under the trade name "DISH Network." The more than 6 million households and estimated 15 million viewers of DISH Network can obtain hundreds of channels of programming in digital video and CD-quality audio, all from an 18 to 20 inch satellite dish. A consumer wishing to subscribe to DISH Network programming first must have the necessary equipment, which consists primarily of a satellite dish antenna and an integrated receiver/decoder, also called a "set-top box," collectively called a DBS system.

Consumers may purchase DBS systems capable of receiving DISH Network programming either directly from EchoStar or from a department store such as Sears, or from an independent retailer of consumer electronics such as a local mom-and-pop consumer electronics store. The relationship between EchoStar and a department store such as Sears or an independent retailer is contractually, factually, and legally one of independent contractors. Attached as exhibits are

affidavits from both EchoStar and the independent retailers[1] describing the relationship between them and EchoStar, attesting to the fact that no agency relationship exists, and stating that no telemarketing calls were made at the direction of or on behalf of EchoStar.

Although the primary issue advanced by Plaintiff is that the calls were made "on behalf of" EchoStar, this case will require the Court to determine seven things: (i) whether EchoStar was the entity "on whose behalf" any of the telephone calls were made; (ii) whether there is any evidence that any Dish Retailer is an agent of EchoStar; (iii) whether EchoStar may be held jointly and severally liable for the independent acts of other defendants; (iv) whether the alleged telephone calls violate the Texas statute; (v) whether the Federal statute on which the plaintiff relies applies only to interstate telemarketing activities; (vi) whether the Telephone Consumer Protection Act applies to Common Carriers; and (vii) whether the mandatory statutory damages in the Federal and Texas statute violate the Texas and Federal Constitution.

STATEMENT OF UNDISPUTED FACTS

EchoStar does not at this time admit any of these alleged facts, but only assumes them for the purpose of this motion. This Statement of Undisputed Facts will be cited as "SOF ___" throughout this Motion.

Plaintiff's alleges that certain other defendants called him

1. Plaintiff alleges that certain defendants initiated telephone solicitation calls to him. (Pl.'s 2d Am. Orig. Pet. ¶¶ 5-192, hereinafter "Def. Ex. 5".)

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[1] With the exception of Texas Telemarketing, Inc. Based upon information and belief, the individual who owned Texas Telemarketing, Inc. is deceased and the company is no longer in business.

Plaintiff alleges that some of these other defendants called on behalf of EchoStar

2. Plaintiff alleges that these certain defendants "represented" EchoStar in the alleged telephone solicitations. (Def. Ex. 5 ¶¶ 18, 39, 53, 60, 74, 81, 88, 102, 116, 137, 144, 151, 158, 165, 172, 179, 186.)

Plaintiff alleges that he holds EchoStar responsible for twenty-one calls

3. Plaintiff stipulates that he only seeks to hold EchoStar liable for twenty-one telephone calls identified in the Stipulated Facts attached as Defendant's Exhibit 1. (Def. Ex. 1 ¶ 1; Shields Depo. at 10:22-11:5.)

4. Plaintiff acknowledges that EchoStar Satellite Corporation does not stipulate that the Alleged Calls actually occurred. (Def. Ex. 1 ¶ 2.)

5. Plaintiff alleges that these calls were made by Digitech DSS, Dish TV, southwest Dish, Tri-Star Marketing, Texas Telemarketing, All American Alarms, and Star-Sat. (Shields Depo. 96:22-97:11).

6. Plaintiff alleges that EchoStar and DIRECTV, Inc. are "jointly and severally liable" for the actions of the other named defendants. (Def. Ex. 5 ¶ 197.)

7. Plaintiff admits that Defendant Kennith Dale Hensley did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 34.)

8. Plaintiff admits that Defendant Richard Dean Jones did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 38.)

9. Plaintiff admits that Defendant All Star Communications of Texas did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 42.)

10. Plaintiff admits that Defendant Jimmy Ray Letulle did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 46.)

11. Plaintiff admits that Defendant Texas Telemarketing, Inc. did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 50.)

12. Plaintiff admits that Defendant New Age Security and Satellite did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 78.)

13. Plaintiff admits that Defendant DIRECTV, Inc. did not initiate a telemarketing call on behalf of EchoStar Satellite Corporation. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 102.)

Plaintiff admits that EchoStar did not make any telephone call to Plaintiff

14. Plaintiff admits that EchoStar itself has never called plaintiff's home. (Shields Depo. 101:25-102:1.).

15. Plaintiff stipulates that neither EchoStar Satellite Corporation, nor any of its employees, officers, or directors initiated any of the Alleged Telephone Calls. (Def. Ex. 1 ¶ 3.)

16. Plaintiff stipulates that neither EchoStar Satellite Corporation, nor any of its employees, officers, or directors made any of the Alleged Telephone Calls. (Def. Ex. 1 ¶ 4.)

17. Plaintiff admits that he has no evidence that EchoStar initiated any of the telephone calls for which he seeks to hold EchoStar responsible. (Shields Depo. 99:6-10.)

18. Plaintiff admits that the name "EchoStar Technologies Corporation was not used in any telemarketing call received by any residential telephone number owned by Joe Shields. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 104.)

19. Plaintiff admits that the name "EchoStar Communications Corporation was not used in any telemarketing call received by any residential telephone number owned by Joe Shields. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 105.)

20. Plaintiff admits that the name "EchoStar Satellite Corporation was not used in any telemarketing call received by any residential telephone number owned by Joe Shields. (Pl.'s Resp. to EchoStar Technologies Corporation's 1st Req. for Admissions ¶ 106.)

Plaintiff admits that he has no evidence that any defendant is EchoStar's agent

21. Plaintiff admits that he has no evidence that any Dish Retailer is an employee or agent of EchoStar. (Shields Depo. 97:16-18.)

Plaintiff admits that he has no evidence that EchoStar authorized or instructed any defendant to call

22. Plaintiff admits in his deposition that he has no evidence that EchoStar specifically authorized any Dish Retailer to make any telemarketing call. (Shields Depo. 97:12-15.)

23. Plaintiff admits that he has no evidence that EchoStar instructed any Dish Retailer to make any telephone call for which he seeks to hold EchoStar responsible. (Shields Depo. 99:11-14.)

24. Plaintiff admits that he has no evidence that EchoStar authorized any Dish Retailer to make any telephone call for which he seeks to hold EchoStar responsible. (Shields Depo. 99:19-100:2.)

Plaintiff admits he has no evidence that EchoStar paid for or approved any defendant to call

25. Plaintiff admits that he has no evidence that EchoStar paid any Dish Retailer to make any telephone call for which he seeks to hold EchoStar responsible. (Shields Depo. 100:3-11.)

26. Plaintiff admits that he has no evidence that any Dish Retailer received approval from EchoStar to make any of the telephone calls for which he seeks to hold EchoStar responsible. (Shields Depo. 100:12-16.)

Plaintiff admits he has no evidence that EchoStar had any notice the calls were going to be made

27. Plaintiff admits that he has no evidence that EchoStar had any notice that any Dish Retailer was going to make any of the telemarketing calls for which plaintiff seeks to hold EchoStar responsible. (Shields Depo. 98:6-10.)

Plaintiff admits he has no evidence that EchoStar has any control over, or common ownership of, any defendant

28. Plaintiff admits that he has no evidence that EchoStar has any control over any Dish Retailer. (Shields Depo. 98:11-13.)

29. Plaintiff admits that he has no evidence that EchoStar has any contractual right to control any Dish Retailer. (Shields Depo. 98:14-17.)

30. Plaintiff admits that he has no evidence of any common ownership between EchoStar and any Dish Retailer and admits that EchoStar and the Dish Retailers are separate companies. (Shields Depo. 100:17-100:23.)

31. Plaintiff admits that he has no evidence that there have ever been any common directors, officers, or employees between EchoStar and any Dish Retailer. (Shields Depo. 100:24-101:8.)

32. Plaintiff admits that he has no evidence that EchoStar participates in the hiring, firing, or discipline of any employee of any Dish Retailer. (Shields Depo. 101:9-13.)

Plaintiff admits he has no evidence that EchoStar created the prerecorded messages

33. Plaintiff admits that he has no evidence that EchoStar created any of the prerecorded messages that were part of the telephone calls for which plaintiff seeks to hold EchoStar responsible. (Shields Depo. 99:1-5.)

EchoStar's uncontroverted affidavits conclusively prove that the calls were not made by, for, or on behalf of EchoStar, and that no defendant is EchoStar's agent

34. EchoStar's evidence conclusively negates that any Dish Retailer is an agent for EchoStar and negate that any call was made by, for, or on behalf of EchoStar. (EchoStar Aff., Haley Aff., Everett Aff., Robinson Aff., Jugon Aff., Fernandez Aff., Black Aff.)

Plaintiff alleges that EchoStar is a common carrier

35. Plaintiff stipulates that his position is that EchoStar Satellite Corporation is a common carrier. (Def. Ex. 1 ¶ 6, Def. Ex. 5 ¶ 196.)

36. Plaintiff acknowledges that EchoStar Satellite Corporation does not stipulate that it is a common carrier. (Def. Ex. 1 ¶ 7.)

Plaintiff admits that the telephone calls were intrastate calls

37. With the possible exception of the Alleged Telephone Call referenced in Paragraph 1(O) of Defendant's Exhibit 1, plaintiff stipulates that all of the Alleged Telephone Calls were initiated and received within the state of Texas. (Def. Ex. 1 ¶ 5.)

LEGAL STANDARD

Summary judgment is proper when a party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). To prevail on summary judgment, EchoStar must either (1) disprove at least one element of each of the plaintiff's theories of recovery, or (2) plead and conclusively establish each essential element of an affirmative defense. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979). Once EchoStar meets its summary judgment burden, summary judgment can be defeated only if plaintiff identifies, in a written response, a material issue of fact on one of the grounds specified in the motion, or identifies a reason why EchoStar is not entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c).

Moreover, a party may move for summary judgment on the basis that the non-movant has no evidence to support its claims. Tex. R. Civ. P. 166a(i). A movant's summary judgment proof in a no-evidence summary judgment procedure does not have to be legally sufficient for the court to grant summary judgment, because the burden of raising a genuine issue of material fact is upon the non-movant. *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68 (Tex. App.–Austin 1998, no writ.) A no-evidence summary judgment is essentially a pre-trial directed verdict. *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.–Houston [1st Dist.] 1999, no pet.). A no-evidence motion for summary judgment is properly granted if the non-movant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant's claim on which the non-movant bears the burden of proof at trial. Less than a scintilla of evidence exists when the summary judgment evidence is so

weak as to do no more than create a mere surmise or suspicion of fact, and the legal effect is that there is no evidence. *Id.* (citing *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

ARGUMENT

I

EchoStar respectfully moves the court to grant its Motion for Summary Judgment because (i) plaintiff has no evidence that any Dish Retailer is an agent of EchoStar; (ii) EchoStar's evidence conclusively demonstrates that no Dish Retailer is an agent of EchoStar; (iii) plaintiff has no evidence that EchoStar was the entity "on whose behalf" any of the telephone calls were made; (iv) EchoStar's evidence conclusively proves that EchoStar was not an entity "on whose behalf" any telephone call was made; (v) as a matter of law, EchoStar may not be held jointly and severally liable for the acts of other defendants; (vi) based upon the plain language of the facts alleged, the alleged telephone calls do not violate the Texas statute because they were not made to a mobile number; (vii) as a matter of law, the Federal statute only applies to interstate telemarketing activities and does not apply to the intrastate acts alleged by plaintiff; (viii) as a matter of law, the Telephone Consumer Protection Act does not apply to common carriers on the facts alleged here and plaintiff alleges that EchoStar is a common carrier; (ix) the mandatory statutory damages in the Federal and Texas statute violate the Texas and Federal Constitution.

HISTORY OF THE STATUTORY PROVISIONS.

Texas has regulated telephone communications for the purpose of solicitation or sale since 1989. In 1989, the Texas legislature enacted section 35.47 of the Texas Business and Commerce

Code relating to "Certain Electronic Communications Made for Purpose of Sales." Under that statute as it was enacted in 1989, it was a criminal offense for a person to

> make a telephone call or use an automated dial announcing device to make a telephone call for the purpose of making a sale if: (1) the person making the call or using the device knows or should have known that the number called is a mobile telephone for which the called person will be charged for that specific call; **and** (2) the called person has not given consent to make such a call to the person calling or using the device or to the business enterprise for which the person is calling or using the device.

See former Tex. Bus. & Com. Code § 35.47 (Vernon 1990) (emphasis added). The Texas statute today still only prohibits calls to mobile telephones, it does not ban calls to residences. As will be discussed in more detail later in this Motion, Texas was not alone in enacting legislation which restricted the conditions under which telephone calls could be made for purposes of solicitation or sales. States across the country enacted similar types of statutes.[2] However, these state statutes only applied to telephone calls and facsimiles sent and received within each state.[3] The Commerce Clause of the United States Constitution prevents states from regulating telephone calls and facsimiles sent between the states.[4] In other words, the states can regulate *intrastate* telemarketing activities, but cannot regulate *interstate* telemarketing activities.

In 1991, recognizing that telemarketers could avoid the restrictions imposed by the states on telephone solicitations and the use of facsimile advertising by operating across state lines, Congress

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2 Refer to Section VII.D.2, *infra*.

3 Refer to Section VII, *infra*.

4 Refer to Section VII, *infra*.

enacted the Telephone Consumer Protection Act ("TCPA" or the "Federal statute"), 47 U.S.C. section 227, to supplement the states' regulation of intrastate telemarketing. In contrast to the Texas statute which at that time only prohibited unsolicited telephone calls to mobile numbers for which the person would be charged, the Federal statute made it unlawful for any person to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" unless specifically exempted by the Federal Communications Commission and regardless of whether the person receiving the telephone call was charged for its transmission. *Comprare* Tex. Bus. & Comm. Code § 35.47, *with* 47 U.S.C. § 227(b)(1)(B). The Federal Communications Commission also promulgated regulations at 47 C.F.R. § 64.1200(e)(2)(iii) that required telemarketers to honor do-not-call requests made by the receiver of a telephone call and made it a violation of the regulation for a telemarketer to call a specific telephone number after being instructed to no longer call that specific telephone number.

As part of the Federal statute, Congress authorized a private cause of action in state courts "as otherwise permitted by the laws or rules of the courts of a State." 47 U.S.C. § 227(b)(3). This provision has been interpreted as vesting exclusive jurisdiction under the Federal statute in the state courts and as providing no cause of action in federal court. *Intl. Sci. & Inst. v. Inacom Communications,* 106 F.3d 1146, 1150 (4th Cir. 1997); *Chair King Inc. v. Houston Cellular Corp.,* 131 F.3d 507,509 (5th Cir. 1997). Further, before suits under the Federal statute may be brought in state courts, this provision requires states to pass legislation or promulgate court rules consenting to state court actions based on the Federal statute. *Autoflex Leasing, Inc. v. Mfg. Auto Leasing, Inc.,*

16 S.W.3d 815 (Tex. App.–Fort Worth 2000, pet. denied). In other words, Congress left it to each state to decide whether to opt into the Federal statute's private remedy provisions.

In 1999, the Texas Legislature acted pursuant to the authority granted in the Federal statute and amended Texas Business & Commerce Code section 35.47, adding subsection (g), to provide a private cause of action in state court for violations of the Federal statute.[5] This new subsection also added a private cause of action for violations of the Texas statute. (As discussed above, before this amendment, only criminal penalties could attach for a violation of section 35.47.) In addition, as part of the 1999 amendments, the Texas legislature added two other subsections to section 35.47 which imposed further restrictions on the use of facsimiles for solicitation or sale in the state of Texas. Tex. Bus. Com. Code § 35.47 (c)-(d). Although the Texas Legislature promulgated additional restrictions on the use of automated devices, the Legislature has still not chosen to ban their use outright, as evidenced by the following:

- Texas Utilities Code § 55.126 regulating device disconnection of automated dial announcing devices, but not banning the use of such devices to dial residential numbers.
- Texas Business and Commerce Code § 37.02(a)(3) regulating the circumstances under which an automated dial announcing device may be used to initiate a telephone call to a consumer's telephone line, but not banning the use of such devices to dial residential numbers.

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[5] Section 35.47(g) provides: "A person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by this subsection, or both . . ."

- 16 Texas Administrative Code § 26.125 regulating use of automatic dial announcing devices, specifically including some of the same restrictions in the Federal statute but not including any outright ban on the use of such devices to dial residential numbers.

The conditions under which telephone calls may be made under the amended Texas statute and the conditions under which telephone calls may be made under the Federal statute are different and conflicting.[6] On the one hand, it is clear that the Texas Legislature's purpose in enacting section 35.47 was to regulate telephone calls made to mobile numbers for which the person called would be charged. Tex. Bus. & Comm. Code § 35.47(a)(1)-(2). It is also clear that the Texas Legislature's purpose in amending section 35.47 was to add further regulations on the transmission of facsimiles, but their purpose was not to add further regulations on the making of live or automated telephone solicitations as evidenced by section (a) not being modified.[7] It is similarly apparent that the Texas Legislature has chosen to impose significant regulations on the use of automatic dial announcing devices, yet has not chosen to ban them outright.[8] On the other hand, the Federal statute prohibits

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[6] *Comprare* Tex. Bus. & Comm. Code § 35.47(a)(1)-(2) (only restricting telemarketing calls made to mobile numbers for which a person will be charged, *with* 47 U.S.C. § 227(b) (restricting telemarketing calls made with an automated dialing device placed to residential numbers).

[7] *Comprare* Tex. Bus. & Comm. Code § 35.47 (1990) with Tex. Bus. & Comm. Code § 35.47 (1999). By 1999, the Texas legislature had significantly amended subsections (c) and (d) related to facsimiles, and added new subsection (g) opting in to the Federal law regarding interstate telemarketing, but had not amended subsection (a) related to live or automated telemarketing calls.

[8] *Id.*; *see also* Tex. Util. Code § 55.126 (regulating the time in which an automated dialing device must disconnect from a telephone line), Tex. Bus. & Comm. Code § 37.02(a)(3) (regulating circumstances under which an automated dialing device may be used to initiate a telephone call to a consumer's line), 16 Tex. Admin. Code § 26.125 (adding regulating on the use

outright the placement of automated telephone calls absent an exception or exemption. 47 U.S.C. § 227(b). If both statutes are read to apply to intrastate telephone solicitations, they are obviously in conflict. But the conflict is a false one. The specific conditions placed by the Texas legislature on telephone solicitations apply only to the telephone calls which the legislature can regulate–Texas intrastate telemarketing activities. The limitations imposed by Congress under the TCPA apply only to the telephone calls the state cannot regulate–interstate telephone calls. The simultaneous enactment of section 35.47(g), opting in to the Federal statute's private remedy, supplements Texas' state law, and provides a Texas citizen with a private cause of action for any interstate call or transmission it receives which violates the provisions of the Federal statute.

To summarize, the Texas statute applies only to intrastate telephone calls, and with regard to those calls only prohibits telephone calls to mobile numbers. The Federal statute applies to interstate calls and prohibits use of an automated dialing machine to call residential numbers in certain circumstances. Neither statute preempts the other, each has a particular sphere of jurisdiction. With the statutes thus reconciled, plaintiff's claims that defendants violated the provisions of either statute are unfounded and fail as a matter of law.

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of automated dialing devices, incorporating language from the Federal statute regarding use of devices to call hospitals and emergency numbers, but not adopting the language from the Federal statute restricting use of those devices to call residential numbers).

II

ECHOSTAR DID NOT INITIATE, PLACE, CAUSE TO BE INITIATED, AUTHORIZE, OR RATIFY ANY TELEPHONE SOLICITATION THAT IS THE BASIS OF THIS SUIT.

Plaintiff stipulated that he seeks to hold EchoStar Satellite Corporation liable for twenty-one telephone calls placed by other defendants in this suit. (SOF 3.) The defendants whom plaintiff believes is directly responsible for initiating the twenty-one telephone calls are defendants Digitech DSS, DISH TV, Southwest Dish, Tri-Star Marketing, Texas Telemarketing, All American Alarm, and Star-Sat. (Def. Ex. 1; SOF 5.) This group of defendants were collectively referred to as the "Dish Retailers" at Mr. Shields' deposition and will be referred to in the same manner for purposes of this motion.[9] (Shields Depo. 96:22-97:11.)

Plaintiff and his counsel admits and stipulates that neither EchoStar Satellite Corporation, nor any of its employees, officers, or directors initiated or made any of the Alleged Telephone Calls. (SOF 15,16.) The question then, is why is EchoStar a defendant in this lawsuit. The answer is that Plaintiff alleges that the telephone calls were made "on behalf of" EchoStar merely because EchoStar's brand name "DISH Network" was mention in some of the calls. Plaintiff's deposition, however, reveals that plaintiff has no evidence upon which he can base any indirect theory of liability, such as authorization or ratification, and no evidence that any Dish Retailer is EchoStar's agent.

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[9] For the purpose of Mr. Shields' deposition all of the defendants listed were collectively referred to as "Dish Retailers." (Shields Depo. 97:12-15.) EchoStar makes no admission or representation that these entities have any relationship with EchoStar, contractual or otherwise, and the use of the collective term "Dish Retailers" is done for convenience only.

Plaintiff admits that EchoStar did not itself make any telephone call for which he seeks to hold EchoStar responsible (SOF 16; Pl.'s Resp. to EchoStar's Mot. to Deny Leave ¶ 12.) Plaintiff admits that he has no evidence that EchoStar asked, authorized, or paid any Dish Retailer to make a telemarketing call on EchoStar's behalf and no evidence that any Dish Retailer is EchoStar's agent. (SOF 21-34.)

III

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT THAT NO OTHER DEFENDANT IS ECHOSTAR'S AGENT.

A. Agency is a consensual relationship premised on control.

In Texas, agency is a consensual relationship between two parties in which one party, on behalf of another, is subject to the other's control. *Bhalli v. Methodist Hosp.*, 896 SW2d 207, (Tex. App.–Houston [14th Dist.] 1995, writ denied).[10] There must be a meeting of the minds to create agency, and consent of both parties, although such consent may be implied rather than expressed. *First Nat'l Bank of Mineola v. Farmers & Merchants State Bank*, 417 S.W.2d 317, 330 (Tex. Civ. App.–Tyler 1967, writ ref'd n. r. e.) (quoting 2 AM. JUR. 2d *Agency* § 17).[11] "The principal must

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[10] *See also Great S. Life Ins. Co. v. Williams*, 135 S.W.2d 241, 245 (Tex. Civ. App.–Amarillo 1940, writ dism'd judgm't. corr.); *Brown v. Cole*, 276 S.W.2d 369, 378 (Tex. Civ. App.–Dallas 1955), *aff'd*, 291 S.W.2d 704 (Tex. 1956); *Neeley v. Intercity Mgmt. Corp.*, 732 S.W.2d 644, 646 (Tex.App.–Corpus Christi 1987, no writ); *Thermo Products Co. v. Chilton Indep. Sch. Dist.*, 647 S.W.2d 726, 732 (Tex. App.– Waco 1983, writ ref'd n.r.e.); *Eckler v. Gen. Council of the Assemblies of God*, 784 S.W.2d 935, 939 (Tex. App.–San Antonio 1990, writ denied); *Happy Indus. v. Am. Specialties, Inc.*, 983 S.W.2d 844. 852 (Tex. App.–Corpus Christi 1998, pet. dism'd w.o.j.).

[11] *See also Carr v. Hunt*, 651 S.W.2d 875, 879 (Tex. App.–Dallas 1983); *Lone Star Partners v. Nationsbank Corp.*, 893 S.W.2d 593, 599-600 (Tex. App.–Texarkana 1994, writ denied).

intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." *First Nat'l Bank of Mineola,* 417 S.W.2d at 330; *Tex. Processed Plastics, Inc. v. Gray Enters., Inc.* 592 S.W.2d 412, 416 (Tex. App.–Tyler 1979, no writ); *Carr,* 651 S.W.2d at 879; *see Lone Star Partners,* 893 S.W.2d at 330.

B. Plaintiff has the burden to plead and prove an agency relationship.

The burden of proving the existence of an alleged agency relationship is on the party who relies on the existence of the alleged relationship. *Buchoz v. Klein*, 184 S.W.2d 271, 271 (Tex. 1944); *Thermo Prods. Co.,* 647 S.W.2d at 732. An agency relationship arises only at the will and by the act of the principal, "and its existence is always a fact to be proved by tracing it to some act of the alleged principal." *Priddy v. Childers*, 248 S.W. 144 (Tex. Civ. App.–Amarillo 1922, writ dism'd).[12] There are two species of agency: actual, either express or implied, and apparent. *Esso Int'l, Inc. v. SS Captain John*, 443 F.2d 1144 (5th Cir. 1971).[13] The law does not presume agency, and if plaintiff alleges agency he has the burden of proving it. *Buchoz v. Klein*, 184 S.W.2d 271, 286 (Tex. 1944). And EchoStar is entitled to fair and adequate notice if plaintiff is going to rely upon an agency theory at trial. *S. County Mut. Ins. Co. v. First Bank & Trust of Groves*, 750 S.W.2d 170, 172 (Tex. 1988).

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[12] *See also Thermo Prods.,* 647 S.W.2d at 732; *Moore v. Office of Atty. Gen.*, 820 S.W.2d 874, 877 (Tex. App.– Austin 1991, no writ); *Schultz v. Rural/Metro Corp. of N.M-Tex.*, 956 S.W.2d 757, 760 (Tex. App.–Houston [14 Dist.] 1997, no pet.).

[13] *See also Thermo Prods.,* 647 S.W.2d at 732; RESTATEMENT (SECOND) OF AGENCY §§ 7-8 (1958); 3 AM.JUR.2D *Agency* §§ 18-19 (1962).

C. Plaintiff's deposition demonstrates that he has no evidence of agency.

Plaintiff's deposition establishes that he has no evidence to establish that any Dish Retailer is an agent of EchoStar and no evidence that EchoStar acted in any way to create the appearance that an agency relationship exists. (SOF 21-34.) Plaintiff has no evidence of a consensual relationship between EchoStar and any Dish Retailer that would subject one the other's control. *Williams*, 135 S.W.2d at 245.[14] Plaintiff has no evidence that there was ever a meeting of the minds between EchoStar and any Dish Retailer to create agency. *First Nat'l Bank,* 417 S.W.2d at 330.[15] Plaintiff has no evidence that EchoStar intended any Dish Retailer to act for EchoStar and no evidence that any Dish Retailer accepted any authority from EchoStar, and no evidence of any intention to do so. *First Nat'l Bank,* 417 S.W.2d at 330; *Tex. Processed Plastics, Inc.,* 592 S.W.2d at 416; *Carr,* 651 S.W.2d at 879; *Lone Star Partners,* 893 S.W.2d at 330.

Despite the fact that plaintiff's Petition does not allege agency, based upon these facts, plaintiff has no evidence to support an agency allegation.

D. EchoStar's affidavit and the affidavits of the Dish Retailers conclusively demonstrate that there is no agency relationship.

EchoStar's uncontroverted affidavit establishes that it did not authorize any of the defendants to make telemarketing calls on its behalf. (Jackson Aff. ¶ 4.) EchoStar's affidavit also establishes that there is no agency relationship between the other defendants and EchoStar. (Jackson Aff. ¶¶ 4-

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[14] *See also Brown*, 276 S.W.2d at 378; *Neeley*, 732 S.W.2d at 646; *Thermo Products Co.*, 647 S.W.2d at 732; *Eckler,* 784 S.W.2d at 939; *Bhalli,* 896 SW2d 207; *Happy Indus.*, 983 S.W.2d at 852.

[15] *See also Carr,* 651 S.W.2d at 879; *Lone Star Partners,* 893 S.W.2d at 599-600.

15.) The affidavits of the Dish Retailers similarly demonstrates that there is no agency relationship between them and EchoStar and further demonstrates that EchoStar was not involved in their telemarketing efforts, if any. (Haley Aff. ¶¶ 3-13; Robinson Aff. ¶¶ 3-14; Everett Aff. ¶¶ 3-14; Jugon Aff. ¶¶ 3-14; Fernandez Aff. ¶¶ 3-14.)

Therefore, EchoStar is entitled to summary judgment that no Dish Retailer is its agent.

IV

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT THAT NO TELEPHONE CALL WAS MADE ON BEHALF OF ECHOSTAR.

Plaintiff may argue that, even if no Dish Retailer is EchoStar's agent, EchoStar is still liable because it is the entity "on whose behalf" the telephone calls were made.[16] This is wrong. The

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[16] As explained in a later section, plaintiff has no cause of action under the federal statute because all of the alleged acts occurred intra-state. That aside, the "on whose behalf" language comes from that part of the Federal statute, 47 U.S.C. § 227(c)(5), authorizing a private right of action as follows:

> A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State–
>
> . . . .

47 U.S.C. § 227(c)(5) (emphasis added).

Similarly, an FCC regulation 47 C.F.R. § 64.1200(e)(2)(iii) explains its requirements related to do-not-call requests as follows:

> If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made.

47 C.F.R. § 64.1200(e)(2)(iii) (emphasis added).

definition of "on whose behalf" in the Federal statute, 47 U.S.C. § 227 and in Federal Communications Commission regulation 47 C.F.R. § 64.1200(e)(2)(iii) is that a telephone call is made on behalf of an entity if that entity instructs someone to make the telephone call.

FCC decisions addressing the meaning of "on whose behalf" do so in the explicit context of instances where an agent of a telemarketer makes telemarketing calls, permitting plaintiffs to proceed directly against the telemarketer for the actions of the telemarketer's agent. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, ¶ 13, 10 F.C.C.R. 12391, 12397, 1995 WL 464817 (1995) ("Our rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations. Calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call.") (footnote omitted).

The same FCC Memorandum Opinion also addresses the meaning of "on whose behalf" in the context of someone who originates or authors a fax which is then given to a "fax broadcaster."

> Some petitioners request clarification of whether responsibility for compliance with the ban on unsolicited facsimile advertising and with the facsimile identification requirement lies with the entity or entities on whose behalf such messages are sent or with service providers ("fax broadcasters"). Generally these commenters are fax broadcasters who disseminate facsimile messages for their clients. They favor excluding any fax broadcaster, whether or not a common carrier, from responsibility for compliance with the rules, and assigning ultimate responsibility to the author or originator of the facsimile message. The commenters contend that the Report and Order indicates only that "carriers" would not be held liable, and did not indicate whether service providers who are not carriers would also be exempt from such requirements.
>
> 35. Decision. We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax

> broadcasters are not liable for compliance with this rule. This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message."

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, ¶¶ 13, 34 10 F.C.C.R. 12391, 12397, 1995 WL 464817 (1995) (emphasis added).

Under the FCC's interpretation set forth in this Memorandum Opinion, EchoStar could only be liable if EchoStar had authored a fax message, then requested that one of the other defendants fax it to plaintiff on behalf of EchoStar, and that such defendant did actually fax the message to plaintiff. By analogy, plaintiff could argue that if EchoStar had created the prerecorded message and then instructed a Dish Retailer to send it, then EchoStar could be liable. However, plaintiff admits that he has no evidence that EchoStar created any of the prerecorded messages that were part of the telephone calls for which plaintiff seeks to hold EchoStar responsible, and admits that he has no evidence that EchoStar paid anyone to do make a call. (SOF 25, 33.) EchoStar's evidence conclusively demonstrates that the calls were not made on EchoStar's behalf. (SOF 34.)

Therefore, EchoStar is entitled to summary judgment that no telephone call was made on behalf of EchoStar.

V

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT THAT ECHOSTAR IS NOT "JOINT AND SEVERALLY LIABLE" FOR THE ACTS OF ANY OTHER DEFENDANT.

Plaintiff alleges that EchoStar is jointly and severally liable for Plaintiff's injuries. (SOF 6.) Plaintiff misapplies the legal theory. For EchoStar to be jointly and severally liable under Texas law Plaintiff must prove that EchoStar itself caused some injury to Plaintiff. *Landers v. E. Tex. Salt*

Water Disposal Co., 248 S.W.2d 731, 734 (Tex. 1952); *see also Black's Law Dictionary* 1378 (7th Ed. 1999). Plaintiff admits that EchoStar itself did not itself commit any act causing injury to Plaintiff. (SOF 14-34.) If each telephone call resulted in a separate injury, then each injury is separate and the injury is not indivisible. If multiple defendants did not act in concert to produce one injury then there is no "joint and several" liability. *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1, 8 (Tex. 1991); *Crown Life Ins. Co. v. Casteel,* 22 S.W.3d 378, 390 (Tex. 2000). The fact that more than one defendant may have injured Plaintiff in a similar way (i.e., multiple independent acts of violating the statute) or that there may be more than one theory of liability does not modify this rule. *Casteel*, 22 S.W.3d at 390; *Sterling*, 822 S.W.2d at 8.

VI

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS UNDER THE TEXAS STATUTE BECAUSE THE TELEPHONE SOLICITATIONS COMPLAINED OF IN PLAINTIFF'S PETITION COMPLY WITH THE PROVISIONS OF THE TEXAS STATUTE.

The Texas statute does not use the "on behalf of" language relied upon by Plaintiff in arguing liability under the Federal statute. Tex. Bus. & Comm. Code § 35.47. Moreover, the Texas statute itself only prohibits placing calls to mobile phones. *Id.* at (a)(1)-(2). Plaintiff does not allege that any of his telephone numbers were mobile numbers, none of the calls went to mobile numbers (Defendant's Ex. 1) and EchoStar is entitled to summary judgment as to its liability under the Texas statute.

Despite the fact that EchoStar did not initiate, place, or cause to be initiated any of the telephone solicitations that are the basis of this suit and despite the fact that EchoStar did not permit, authorize, or ratify the initiation of any of the telephone solicitations that are the basis of this suit,

the telemarketing activities complained of by plaintiff were clearly intrastate – they were apparently placed from locations in and around Houston, Texas to Friendswood, Texas.[17] (SOF 37; Def. Ex. 1.) State law regulates telemarketing activities in Texas and this Court must look to Texas law to determine whether the telephone calls complained of by plaintiff violate state law.[18] Under Texas Business & Commerce Code section 35.47(g) a person who receives a communication that violates "this section" may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by "this subsection," or both. Thus, one must first turn to the subsections of section 35.47 to determine whether the telephone calls complained of by plaintiff violate section 35.47.

The relevant subsections of section 35.47 provide the following:

> (a) A person may not make a telephone call or use an automatic dial announcing device to make a telephone call for the purpose of making a sale if:
> (1) the person making the call or using the device knows or should have known that the called number of a mobile telephone for which the called person will be charged for that specific call; and
> (2) the called person has not given consent to make such a call to the person calling or using the device or to the business enterprise for which the person is calling or using the device.

Tex. Bus. Com. Code § 35.47 (a)(1)-(2).

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[17] *See* plaintiff's Petition, as amended, and the allegations as to the originating telephone numbers of the calls. Plaintiff does not allege that he received any telephone call from outside the state of Texas.

[18] Refer to Section VII, *infra*.

Similarly, Texas has chosen to restrict, but not ban, the use of automatic dial announcing devices at Texas Utilities Code § 55.126, Texas Business and Commerce Code § 37.02(a)(3), and 16 Texas Administrative Code § 26.125. The Public Utilities Commission regulations adopted in 16 Texas Administrative Code § 26.125. (under the Public Utility Regulatory Act, Texas Utilities Code Annotated § 14.002) chose to expressly incorporate only limited provisions from the federal statute, such as the line seizure requirements of 47 C.F.R. § 68.318(c)(2), but chose not to adopt other provisions. 16 Tex. Admin. Code § 26.125(b)(5).

Plaintiff's petition, taken together with the telephone communications upon which he bases this lawsuit, prove these telephone calls do not violate the subsections of section 35.47 relating to telephone communications for the purpose of solicitation or sale. It is clear that under the Texas statute, prior consent to initiate a telephone solicitation is only required under those circumstances in which the recipient of the telephone solicitation is using a mobile number and will be "charged" for its receipt of the telephone call. Tex. Bus. Com. Code § 35.47 (a)(1)-(2). If the person receiving the telephone solicitation will not be charged, then an "unsolicited" telephone solicitation is allowed under the statute if it complies with the requirements of subsections (a)(1)-(2).

In its Petition, plaintiff does not allege any facts from which it can be inferred that he received a call to a mobile number and was "charged" for the receipt of the telephone call complained of. Presumably, plaintiff does not allege these facts, because none exist. In fact, plaintiff alleges that his telephone numbers were "residential" numbers, not "mobile" numbers. (Def. Ex. 5 ¶ 4.)

Because the telephone calls at issue in this lawsuit were sent solely within the state of Texas and were in compliance with the requirements of the Texas statute, EchoStar is entitled to summary judgment on plaintiff's claim alleging a violation of section 35.47's provisions.

VII

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS UNDER THE FEDERAL STATUTE BECAUSE IT APPLIES ONLY TO TELEPHONE CALLS TRANSMITTED FROM ONE STATE TO ANOTHER STATE.

Plaintiff's cause of action purportedly founded upon a violation of the Federal statute fails as a matter of law because the Federal statute applies only to telephone communications transmitted between states. The majority of courts that have considered the issue of whether the TCPA's private cause of action applies to intrastate, as well as interstate, telemarketer's activities have held that the statute applies only to interstate telemarketing activity.[19] Additionally, the Federal Communications

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[19] *The Chair King, Inc. v. Houston Cellular Corp.*, No. CIV-A. 95-CV-1066, 1995 WL 1693093, *1 (S.D. Tex. Nov. 7, 1995) (Order on Defendants' Motion to Dismiss, p.2 (emphasis in original)), *vacated on other grounds* 131 F.3d 507 (5th Cir. 1997) (lack of subject matter jurisdiction); *see also, Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101 (S.D. Ga. September 4, 1996), *vacated* 136 F.3d 1287 (11th Cir. 1998), *modified,* 140 F.3d 898 (11th Cir. 1998). EchoStar is aware of only one case, *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. Ct. App. 2000), in which an intermediate state court of appeals has held that the TCPA applied to intrastate faxes. EchoStar submits that the Court in *Hooters* based its holding on an incorrect reading of the statute as explained below in Section VI.C. of this motion. EchoStar also submit that the recent denial of a motion to dismiss a parens patriae action by the Texas attorney general that was based on intra-state facsimiles, under a separate TCPA provision, is neither controlling nor persuasive here. *See Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085 (W.D. Tex.2000). pending in the United States District Court for the Western District of Texas, Austin Division. Because Judge Sparks' Order in denying Blast Fax, Inc.'s Motion to Dismiss does not, and should not have, any precedential value in this Court, EchoStar respectfully submit that any reliance thereon would be misplaced. Furthermore, the reasoning in Judge Sparks' Order is clearly contrary to established Fifth Circuit law concerning the inapplicability of the TCPA to intrastate telemarketing activities, and the well-reasoned decisions of other courts and, consequently, it is anticipated that the

Commission ("FCC"), the federal agency directed to adopt rules and regulations implementing the Federal statute, has opined that the statute only applies to interstate telemarketing activity.[20] The language of the statute itself, as well as its legislative history, make it clear that the TCPA is intended only to apply to interstate telemarketing activity.[21] For courts or the FCC to hold otherwise would controvert constitutional guarantees under the Commerce Clause. Finally, the only way to give effect to all of the provisions of the 1999 amendments to the Texas statute with the provision opting in to the Federal statute's private remedy scheme is to construe the Federal statute, or at least its private remedy terms, to apply only to interstate transmissions. In short, the Federal statute provides no private cause of action to the recipient of an unsolicited telephone solicitation.

A. COURTS CONSIDERING THE APPLICABILITY OF THE FEDERAL STATUTE HAVE FOUND THAT IT ONLY APPLIES TO INTERSTATE TELEMARKETING ACTIVITY.

In *Chair King,* the United States District Court for the Southern District of Texas concluded, based on the language of the TCPA, and its legislative history, that "[t]he TCPA only attempts to regulate *inter*state telemarketing activity. The statute does not state otherwise and to so hold would controvert constitutional guarantees under the Commerce Clause. The recipient of an intrastate fax advertisement has no private right of action under the TCPA." *The Chair King, Inc. v. Houston*

Fifth Circuit, if and when it has an opportunity to review Judge Sparks' action in *Blast Fax*, will find it to be contrary to prevailing law. A more complete discussion of the inadequacies of the flawed reasoning in both *Hooters* and *Blast Fax*, please *see infra* at Section VI.C. It should also be noted that, contrary to the situation herein, in *Blast Fax* the defendant was allegedly engaged in facsimile transmissions which were both *inter*state and *intra*state in nature.

[20] Refer to Section VII.B, *infra*.

[21] Refer to Sections VII.A-D, *infra*.

Cellular Corp., No. CIV-A. 95-CV-1066, 1995 WL 1693093, *1 (S.D. Tex. Nov. 7, 1995) (Order on Defendants' Motion to Dismiss, p.2 (emphasis original)), *vacated on other grounds* 131 F.3d 507 (5th Cir. 1997) (lack of subject matter jurisdiction).

Although the Fifth Circuit vacated the trial court's dismissal in *Chair King* because Federal courts lack subject matter jurisdiction under the TCPA, it did not question the District Court's reasoning that the TCPA applies only to interstate telemarketing activities. 131 F.3d at 509. To the contrary, the Fifth Circuit's discussion of Congress' purpose in enacting the TCPA is entirely consistent with the District Court's conclusion:

> Congress enacted the TCPA as a supplement to state efforts to regulate marketing activities . . . Congressional action was needed as states had no independent regulatory power over *interstate* telemarketing activities. By creating a private right of action in state courts, Congress allowed states, in effect, to enforce regulation of *interstate* telemarketing activity.

Id. at 513 (citations omitted) (emphasis added).

The District Court and the Fifth Circuit are not alone in their view that the TCPA applies only to interstate telemarketing activities. The Fourth Circuit has recognized that the dominant reason Congress enacted the TCPA was to permit the states to regulate interstate telemarketing, which the states lack jurisdiction to regulate. *Int'l Sign & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997). In addition, the Southern District of Georgia concluded that the TCPA does not apply to intrastate faxes. *Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101 (S.D. Ga. September 4, 1996), *vacated*, 136 F.3d 1287, 1288 (11th Cir. 1998), *modified* 140 F.3d 898 (11th Cir. 1998).

More importantly, in 1999 the Texas Legislature grappled with the issue of regulating telemarketing activities while enacting the amendments to section 35.47. *See* Hearing on House Bill 23, Texas House of Representatives, Business & Industry Committee, March 23, 1999. During this session, the Texas Legislature was fully cognizant of, and expressly recognized, the fact that the Federal statute applies solely to interstate telemarketing activities. *See id.* Representative Goolsby, in addressing the recommended changes to section 35.47 stated that, "[i]n 1991, Congress passed the Telephone Consumer Protection Act, better known as the TCPA, to regulate the *inter*state transmissions and to allow a civil cause of action for individuals harmed by such action." *Id.* (emphasis added). Speaking at the same hearing on behalf of House Bill 23, Luther Jones described the application of the TCPA as follows: "[t]he United States Congress has acted on this, provided the Telephone Consumer Protection Act which provides basically a remedy to people to handle unsolicited faxes across interstate lines, but there is no remedy within the state for transmissions of fax while advertising within the state." *Id.*

B. THE FEDERAL COMMUNICATIONS COMMISSION HAS OPINED THAT THE FEDERAL STATUTE APPLIES ONLY TO INTERSTATE COMMERCIAL TELEMARKETING ACTIVITIES.

It is also significant that the FCC has opined, on at least two separate occasions, that the TCPA applies only to interstate commercial telemarketing activities. In a March 1998 letter ruling,[22] the FCC stated:

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[22] From Geraldine A. Matise, Chief, Network Services Division, Common Carrier Bureau, to Sanford L. Schenberg (March 3, 1998) (emphasis added)

> The Communications Act, and specifically Section 227 of the Act, the TCPA, establishes Congress' intent to have the Commission regulate the use of the *interstate* telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, auto dialers, or pre recorded messages . . . In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and Commission regulations, enacted pursuant to the TCPA, govern interstate commercial telemarketing calls in the United States.

In another letter ruling,[23] the FCC stated:

> Section 2(a) of the Act grants the Commission jurisdiction over all interstate and foreign communications. Interstate communications are defined as communications or transmissions between points in different states. Section 2(b)(1) of the Act generally reserves to the states jurisdiction over intrastate communications. Intrastate communications are defined as communications or transmissions between points within a state . . . In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls.

Copies of these letters as they appear on the FCC's website[24] are included in the Appendix.

C. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTION 152(A)-(B) OF THE COMMUNICATIONS ACT OF 1934 LIMITS APPLICATION OF THE FEDERAL STATUTE TO INTERSTATE TELEMARKETING ACTIVITIES.

The question presented to this Court, is whether, in enacting the Federal statute, Congress intended the statute to apply to intrastate telemarketing activities. In determining legislative intent, the Court should look first to the language of the TCPA. *New York State Conf. of Blue Cross & Blue*

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[23] From Geraldine A. Matise, Chief, Network Services Division, Common Carrier Bureau to Delegate Ronald A Guns (January 26, 1998)

[24] www.fcc.gov/ccb/consumer_news/tcpa.html

Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 647 (1995). The statute should be read as a whole since the meaning of statutory language depends on context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Additional guidance may be sought from the statutory scheme within which section 227 resides. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *United States v. Fausto*, 484 U.S. 439, 453 (1988). In construing the Federal statute, this Court should adopt that sense of the words in the statute that best harmonizes with the statutory context and promotes the policy and objectives of Congress. *United States v. Hartwell,* 73 U.S. 385, 396 (1867). As explained below, the statutory language and context, as well as the policy and objectives of Congress as expressed in the legislative history of the TCPA, demonstrate that the TCPA applies solely to interstate telemarketing activities.

The TCPA, 47 U.S.C. section 227, appears in Chapter 5, Title 47 of the United States Code dealing with wire and radio communication. Chapter 5 is known as the Communication Act of 1934, 47 U.S.C. section 151, notes (References In Text). Section 152(a) of Chapter 5 limits the application of all provisions of that Chapter, including section 227, to interstate and foreign communication by wire. 47 U.S.C. § 152(a) (stating "[t]he provisions of [Chapter 5] shall apply to all interstate and foreign communication by wire ..."). Section 152(b) expressly provides that the Act does not apply to instrastate communications with limited exceptions. Consequently, section 227(b)(1)(B) of the TCPA, when read in conjunction with section 152(a), makes it "unlawful for any person within the United States to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" in interstate communication, but does not apply to intrastate communication.

Section 152(b) does not exclude the TCPA (section 227) from the general rule that the Act applies only to interstate communications. However, Section 152(b) provides that "[e]xcept as provided in Sections 223 through 227 . . . nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier." A Georgia Court has interpreted this provision to exclude Sections 223 through 227 from the general mandate restricting the statute to interstate communications. *See Hooters*, 537 S.E.2d 468, 471-72 (Ga. Ct. App. 2000). Judge Sparks, in the Western District of Texas in the *Blast Fax* case appears to adopt this inaccurate interpretation as well. *Texas v. American Blastfax, Inc.*, 121 F. Supp.2d 1085 (W.D.Tex.2000). EchoStar respectfully submits this was in error. This interpretation ignores the phrase "[e]xcept as provided in... ." Giving that phrase its ordinary meaning, Section 152(b)'s general rule against applying the Act to intrastate communications governs Sections 223 through 227 as well, except where those provisions specifically provide for application to intrastate communication. For example, in section 227, subsection (d) prohibits any person from sending facsimiles using fax machines that do not comply with the technical and procedural standards prescribed under subsection (d). Section 227(e) provides that the states' authority over intrastate communications is preempted with respect to section 227(d). Thus, section 227 specifically provides for the application of subsection (d) to intrastate communications, but does not specifically provide for the application of subsection (b) to intrastate communications.[25]

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[25] As another example, § 225, which guarantees telecommunication services for the hearing and speech-impaired, expressly provides that it is applicable to intrastate communications.

Congress knows how to expressly provide that certain provisions of the Act apply to intrastate communications. Thus, under principles of statutory construction, in the absence of language pertaining to subsection (b) of section 227 specifically providing for its application to intrastate communication, the general rule that the Act is applicable only to interstate communications applies.

In support of EchoStar's Motion for Summary Judgment and the abovementioned interpretation of the statutes, EchoStar urged this Court to adopt the rationale used in *Omnibus Int'l, Inc. v. AT&T, Inc.* rendered in May of 2001. Cause No. 00-04724-E. In *Omnibus*, Judge Patterson of the District Court of Dallas County, granted a joint motion for summary judgment in its entirety to a series of claims brought by Omnibus alleging AT&T violated the same statutes involved in this lawsuit.[26] In fact, the legal argument advanced in support of AT&T's Motion for Summary Judgment there is legally similar to EchoStar's Motion for Summary Judgment. As a result, under the principles of statutory construction and the *Omnibus* decision, the Federal statute must be read as regulating only interstate telemarketing activities.

See 47 U.S.C. § 225(b)(1) ("The Commission shall insure that interstate and intrastate telecommunications relay services are available . . . to hearing-impaired and speech-impaired individuals in the United States."). Moreover, § 225 contains an express determination that application of that Section to interstate as well as intrastate communications is necessary to insure a rapid and efficient nationwide communication service and to increase the utility of a national telephone system. 47 U.S.C. § 225(b)(1).

[26] The *Omnibus* motion, including exhibits and the Order granting the motion are included in the Appendix for the Court's convenience.

D. CONGRESSIONAL FINDINGS AND THE LEGISLATIVE HISTORY OF THE FEDERAL STATUTE ALSO PROVE THAT IT WAS INTENDED TO APPLY ONLY TO INTERSTATE TELEMARKETING ACTIVITIES.

While the limitation of 47 U.S.C. section 227(b) solely to interstate telemarketing activities is clear from the plain language of sections 152(a)-(b), any doubt on this issue is erased by examining the Congressional Statement of Findings, the testimony presented to Congress, and the legislative debate concerning the TCPA, all of which clearly reflect Congress' intention that the TCPA apply only to interstate facsimile transmissions.[27]

1. Congressional Statement of Findings.

In passing the TCPA, Congress determined that federal regulation of *interstate* communications was necessary to supplement the state's regulation of *intrastate* telemarketing practices, because states are powerless to control the activities of telemarketers beyond their borders. Congress found that:

> Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices.

47 U.S.C. § 227, Congressional Statement of Findings No. 7.

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[27] The TCPA imposes restrictions on interstate telephone solicitations as well as interstate fax transmissions of unsolicited advertisements. 47 U.S.C. §227(b)(1)(A)-(D). Much of the testimony and legislative debate concerning the TCPA focused on the part of the legislation dealing with interstate telephone solicitation. Nonetheless, this testimony and debate illustrates Congress' intention that the prohibitions contained in §227(b), including the prohibition against unsolicited fax advertisements, were intended to apply only to interstate communications. All of these prohibitions are contained within the subsection of the TCPA, and the scope of those prohibitions is defined by the same prefatory language. *See* 47. U.S.C. §227(b)(1).

What is not stated in the Statement of Congressional Findings is also significant. Congress is well aware that it is limited by the Commerce Clause to regulation of interstate commerce unless Congress makes certain findings. The Commerce Clause delegates to Congress the power to "regulate Commerce . . . among the several states . . ." U.S. Const. art. I, § 8, cl. 3. Interstate commerce does not include "that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons v. Ogden*, 22 U.S. 1, 194-95 (1824). Under the Commerce Clause, Congress has the power to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) intrastate activities that substantially affect interstate commerce. *United States v. Lopez,* 514 U.S. 549, 557-559, 115 S. Ct. 1624, 1629-30 (1995). Intrastate telemarketing activities do not fall within these three categories that Congress has power to regulate because (1) intrastate telephone calls and messages do not constitute "commerce among the several States" and (2) telephone equipment, when utilized to make such calls, does not constitute a channel or instrumentality of interstate commerce.[28]

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[28] *See Western Union Tel. Co. v. Lenroot,* 323 U.S. 490, 502 (1945) ("[T]elegraph lines *when extending through different states* are instruments of [interstate] commerce. . . .") (emphasis added); *Pacific Tel.Co. v. Tax Comm'n,* 297 U.S. 403, 414 (1936) (holding that an occupation tax based upon a percentage of the gross income of the intrastate portion of the telephone and railroad companies' business is not a tax upon an instrumentality of intrastate commerce); *Western Union Tel. Co. v. James*, 162 U.S. 650, 654 (1896) ("It has been settled by the adjudications of this Court that telegraph lines, when extending *through* different states, are instruments of commerce which are protected by the [Commerce Clause], and that messages passing over such lines from *one state to another* constitute a portion of commerce itself") (emphasis added); *Western Union Tel. Co. v. Alabama,* 132 U.S. 472, 473 (1889) (. . .all messages carried and delivered exclusively within [a] State ... are elements of internal commerce solely within the limits and jurisdiction of the State"); *Leloup v. Port of Mobile*, 127 U.S. 640, 645 (1888) ("communication by telegraph is commerce . . . and if carried *between* different States, it is commerce among the several States, and directly

Thus, Congress could regulate intrastate facsimile advertising only if it had a rational basis for determining that such intrastate activity substantially affects interstate commerce. *Lopez*, 115 S. Ct. at 1629.

However, as the Congressional findings accompanying the TCPA and the legislative history (discussed below) of the TCPA demonstrate, Congress never concerned itself with whether intrastate telemarketing activity substantially affects interstate commerce, let alone determined that intrastate facsimile advertising substantially affect interstate commerce. Congress' concern was to supplement the states' efforts to regulate telemarketing activity by providing the states a vehicle to regulate interstate telemarketing if they desired to do so.

Congress did not identify a significant cost impact of unsolicited telephone calls such that interstate commerce would be affected. Congress did identify two problems associated with unsolicited facsimile advertisements: (1) facsimile advertisements effectively shift the cost of advertising to the recipient since the recipient must pay for the paper on which the advertisement is printed as well as the cost of the electricity to run the facsimile machine; and (2) facsimile advertisements prevent the use of the facsimile machine for business purposes for the time required

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within the power of regulation conferred upon Congress . . .") (emphasis added); *Telegraph Co. v. Texas,* 105 U.S. 460, 466 (1881) (holding that a tax on private telegrams sent solely within a state does not constitute a regulation of interstate commerce because "regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State . . . "); *See also American Network v. Washington Util. & Transp. Comm'n,* 776 P.2d 950, 959 (Wash. 1989) (holding that a security deposit rule imposed upon telecommunications companies providing solely intrastate communications services "does not regulate the instrumentalities of commerce, but regulates only intrastate usage of telecommunications services").

to print the facsimile advertisement. H.R. Rep. No. 317, 112nd Cong., 1st Sess. 10, 25 (1991). Neither the TCPA nor its legislative history contain any findings or evidence that there is any cost shifting involved in telephone calls that affected interstate commerce; similarly, there were no findings that the cost shifting or "tying up" of facsimile machines associated with intrastate facsimile advertisements has a substantial effect on interstate commerce. *See House Subcomm. Hng. on Telemarketing Practices, supra: House Subcomm. Hng. on Telemarketing/Privacy Issues, supra; Senate Subcomm. Hng., supra; Senate Report on the TCPA, supra;* 137 Cong. Rec. S. 16204-16208 (daily ed. November 7, 1991); 137 Cong. Rec. S. 18781-18786 (daily ed. November 27, 1991). The fifteen Congressional findings accompanying the TCPA are also devoid of any determination that intrastate telephone calls or facsimile advertisements have any effect on interstate commerce. 47 U.S.C. § 227, Congressional Statement of Findings Nos. 1-15. That Congress did not discuss whether, let alone conclude that, intrastate facsimile advertisement substantially affects interstate commerce further reflects Congress' intention that the TCPA apply solely to interstate commerce.

2. Testimony and Legislative History.

Witnesses who testified before Congress repeatedly cited the inability of the states to regulate interstate telemarketing activities as the justification for federal legislation. Representative Matthew J. Rinaldo, one of the sponsors of House Bill 2184, a precursor to the legislation finally adopted as the TCPA, testified that, because "[r]egulation of our telephone network is divided between the state and Federal government[,] . . . Federal legislation is necessary to insure that this junk fax problem is curtailed in interstate transmission of fax messages." *Telemarketing Practices: Hearings on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm.*

on Energy and Commerce, 101st Cong., 1st Sess. 3-4 (1989) (statement of Rep. Rinaldo) (emphasis added) [hereinafter "House Subcomm. Hng. on Telemarketing Practices"]. Representative Shays, another sponsor of H.R. 2184, noting that several states had enacted legislation to restrict intrastate facsimile advertising, testified that "[t]here is no doubt in my mind that we must offer the consumer, who does not want to receive any pay for *interstate* ads, the same protection." *Id.* at 22 (statement of Rep. Shays) (emphasis added).

The Senate's Report on the TCPA also makes clear that the rationale for federal legislation was to supplement state regulation of intrastate telemarketing by permitting states to regulate interstate telemarketing:

> Over 40 States have enacted legislation limiting the use of [automatic dialer recorded message players] or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.

S. Rep. No. 102-178, 102nd Cong., 1st Sess. 3, reprinted in 1991 U.S.C.C.A.N. 1968, 1970 (emphasis added) [hereinafter "Senate Report on the TCPA"]. The Senate Report on the TCPA also contains the conclusion of the Senate Committee on Commerce, Science, and Transportation that "Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place *interstate* telephone calls." *Id.* at 6, reprinted in 1991 U.S.C.C.A.N. at 1973 (emphasis added).

Senator Hollings stated on the floor of the Senate that federal legislation was necessary to regulate interstate telemarketing because of the States' inability to regulate interstate calls. 137

Cong. Rec. S. 16204 (daily ed. November 7, 1991) (stating state law does not, and cannot, regulate interstate calls). Only Congress can protect citizens from telephone calls that cross state boundaries. That is why Federal legislation is essential. The legislative history of the TCPA is replete with this type of testimony concerning the need for federal regulation of any interstate telemarketing activities because of the inability of the states to regulate such interstate practices. *See, e.g., Telemarketing/Privacy Issues: Hearings on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce,* 102nd Cong. 1st Sess. 28 (1991). The language of the TCPA and its legislative history unequivocally establish that Congress sought only to assist the states' efforts to regulate telemarketing activities by providing states with the authority to regulate interstate faxes if they so choose.

E. THE FEDERAL STATUTE DOES NOT PREEMPT STATE LAWS REGULATING INTRASTATE TELEMARKETING ACTIVITIES.

Plaintiff may unwisely argue that section 227(a) of the TCPA preempts state regulations on intrastate telemarketing activities that are less restrictive than those imposed by the TCPA. Section 227(e) provides:

> (e) Effect on State law
>
> (1) State law not pre-empted
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall pre-empt any State law that imposes more restrictive intrastate requirement or regulations on, or which prohibits –
>
> (a) The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

47 U.S.C. § 27(e).

Plaintiff may argue that it can be inferred from this language that, because Congress has expressly stated that the TCPA does not pre-empt more restrictive state regulations on intrastate telemarketing activities, state regulations governing intrastate telemarketing activities that are less restrictive than the TCPA are pre-empted.

The Supreme Court is reluctant to infer pre-emption, *Building & Construction Trade Council v. Associated Builders,* 507 U.S. 218, 224 (1993); nor should it be lightly presumed. *California Federal Sav & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). "[P]re-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In determining whether Congress has invoked its pre-emption power, the primary emphasis is on ascertaining Congressional intent. *R.J. Reynolds Tobacco Co. v. Durham County, N.C.,* 479 U.S. 130, 138, 140 (1986). Moreover, there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

There is no express preemption in section 227(e). Rather, under a heading reading, "state law not pre-empted," section 227(e) explicitly states that nothing in the TCPA should be construed to pre-empt more restrictive state regulation of intrastate telemarketing activities. Nothing in the Congressional findings or legislative history of the TCPA suggests that Congress' "clear and manifest purpose" in enacting the TCPA was to pre-empt less restrictive state laws governing intrastate telemarketing activities. To the contrary, the Congressional findings and legislative history confirm that it was Congress' intent that the TCPA should supplement state laws regulating intrastate

telemarketing activities because the states were powerless to control interstate telemarketing activities. *See* Section VI.D.2., above. Senator Hollings, sponsor of the TCPA, specifically affirmed, while speaking on the floor of the Senate, that the TCPA was not meant to preempt state regulation of intrastate communication:

> Section 227(e)(1) clarifies that the Bill is not intended to pre-empt state authority regarding intrastate communications except with respect to the technical standards under §227(d) and subject to §227(e)(2).

137 Cong. Rec. S. 18784 (daily ed. November 27, 1991). Moreover, because intrastate communication has traditionally be regulated by the states,[29] it must be presumed that Congress did not intend to preempt state laws in the area of intrastate communication. *ARC Am. Corp.*, 490 U.S. at 101.

Reading into the TCPA an intent to pre-empt less restrictive regulation of intrastate telemarketing activities would be an extremely peculiar conclusion, because this is a federal statute that leaves the adoption of key provisions discretionary with the individual states, including the provision that creates the private cause of action on which plaintiff seeks to rely here. As noted earlier, the private cause of action for TCPA violations provided in section 227(c)(5) is available

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[29] *See, e.g., Western Union Telegraph Co. v. Alabama*, 132 U.S. 472, 473 (1889) (recognizing, over one hundred years ago, that intrastate communication falls solely within the jurisdiction of the states).

only if a state takes affirmative action to make that cause of action available in the courts of that state. *See AutoFlex, supra.*[30]

When the Texas legislature opted into the TCPA private cause of action (by adopting subsection (g) of Texas Business and Commerce Code section 35.47), it simultaneously provided that unsolicited telemarketing activities in Texas would be permitted under certain circumstances, or in the case of facsimile advertising, during certain hours and with the disclosures described above (by adopting subsections (c) and (d) of section 35.47). If opting into the TCPA's private cause of action made every intrastate unsolicited telemarketing activity actionable, then the other portions of the Texas legislature's 1999 amendments to section 35.47–restricting hours and requiring certain disclosures on unsolicited facsimile advertising–were senseless nullities. This Court would reach that disfavored result only if it reached to infer from the TCPA an intention by Congress to preempt less restrictive regulation of intrastate telemarketing activities.[31] It should not. Nothing in the TCPA supports the conclusion that it was Congress's "clear and manifest purpose" to preempt less

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[30] It also bears repeating that the private cause of action created under section 227(c)(5) may not be brought in federal court. *See Chair King* (5th Cir.), *supra.* Section 227(c)(5) actions may be brought, if at all, only in state court, and only in states that have authorized them.

[31]Further, EchoStar submit that if this Court were to hold that the Federal statute applies to intrastate and interstate telemarketing activities and further holds that the Texas legislature intended to opt into the Federal statute as to both intrastate and interstate telemarketing activities, the Texas statute would be rendered unconstitutionally vague. The conflict under such a holding between the provisions of the Texas statute and the terms of the Federal statute as incorporated by the Texas legislature into the Texas statute would render the provisions irreconcilable. As applied to the facts here, the Texas statute would be unconstitutionally vague and EchoStar would be entitled to judgment as a matter of law.

restrictive intrastate regulation. By leaving the private remedy for TCPA violations to the discretion of individual states, Congress plainly indicated to the contrary.[32]

VIII

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT THAT THE TELEPHONE CONSUMER PROTECTION ACT DOES NOT APPLY TO COMMON CARRIERS.

Should the Court determine that the Federal statute does apply to this litigation, then the Court must then consider whether the elements of the Federal statute are satisfied and whether Federal exemptions and defenses exist.

Plaintiff alleges and stipulates that his position is that EchoStar is a common carrier. (SOF 35; Def. Ex. 5 at ¶ 196.) Plaintiff has effectively plead himself out of a cause of action[33] under the Federal statute and EchoStar is entitled to summary judgment because both Congress and the Federal Communications Commission have stated that the Telephone Consumer Protection Act does not apply to common carriers. S. Rep. No. 178, 102d Cong., 1st Sess. 9 (1991) ("regulations . . . apply to the persons initiating the telephone call or sending the message and do not apply to the common

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[32]Moreover, plaintiff's federal cause of action in this case rests on a state statute, Texas Business and Commerce Code section §35.47(g). Even if the Court believed that the Federal statute generally should be construed to reach intrastate telemarketing activity – a conclusion it should not reach, for all the reasons set out above, the Court still would be required to decide whether the Texas statute provides a cause of action that applies to intrastate telemarketing activity. EchoStar submits that, in order to give effect to all provisions of the 1999 amendments to section 35.47, the TCPA cause of action provided for in section 35.47(g) must be construed, as a matter of state law, only to apply to interstate telemarketing activity, with sections 35.47(a) regulating intrastate telemarketing activity.

[33] *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex.1974) (plaintiff may plead facts that affirmatively negate cause of action).

carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message."); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752 ¶ 54 (F.C.C. Oct. 16, 1992) ("In the absence of 'a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,' common carriers will not be held liable for the transmission of a prohibited facsimile message."); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 10 FCC Rcd. 12391 ¶¶ 33-34 (F.C.C. Aug. 7, 1995) ("We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule. This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message."). Plaintiff's allegation has plead himself out of a cause of action. *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex.1974) (plaintiff may plead facts that affirmatively negate cause of action).

Although plaintiff is likely to cite an FCC opinion which states that common carriers are liable for the acts of their agents, as he has in certain other moving papers, he is wrong. The TCPA applies to the telemarketers, not upstream manufacturers or service providers. *In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, 9 FCC Rcd 2164 ¶ 25 (F.C.C. May 4, 1994) ("Current TCPA obligations primarily apply to the originator of the unwanted message, e.g., telemarketers."). The person "on whose behalf" a telephone call is placed is the person who asked for the call to be made, not any

party that could possible benefit from the telephone call. EchoStar did not ask anyone to make the call, EchoStar is not a telemarketer, therefore EchoStar is not liable. EchoStar is therefore entitled to summary judgment on all of plaintiff's claims.

Plaintiff may erroneously refer the Court to *In the Matter of Long Distance Direct.* 15 FCC Rcd 3297 ¶ 9 (F.C.C. Feb. 17, 2000) to argue that EchoStar is liable for the acts of others. That citation is entirely out of context. The application of liability there did not involve the TCPA, rather, it involved an interexchange carrier (ICX) violating section 258 of The Communications Act of 1934 for using a prohibited method of securing PIC-change authorizations, a practice commonly called "cramming." The FCC's statement there is simply that an ICX cannot avoid liability by using a third party to accomplish a prohibited PIC-change for the common carrier. This has nothing to do with the common carrier exemption from the TCPA. That aside, EchoStar has already demonstrated there is no agency relationship. (SOF 21.)

EchoStar did not ask anyone to make the call, EchoStar is not a telemarketer, therefore EchoStar is not liable. EchoStar is therefore entitled to summary judgment on all of plaintiff's claims.

XIV

ECHOSTAR IS ENTITLED TO SUMMARY JUDGMENT THAT THE MANDATORY $500 DAMAGE AWARD IN THE TEXAS AND FEDERAL STATUTE IS GROSSLY DISPROPORTIONATE TO ACTUAL DAMAGES AND THEREFORE UNCONSTITUTIONAL.

EchoStar is also entitled to summary judgment on plaintiff's claims under the Texas and Federal statutes because those claims violate EchoStar's constitutional rights under both the Texas Constitution and the United States Constitution.

A. Under the Federal Constitution.

The federal constitution guarantee of due process places substantive limits on the size of damage awards. A damage award may not be arbitrary or grossly disproportionate to the actual harm suffered. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Eg., Missouri Pac. Ry. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages "grossly out of proportion to the possible accrual damages" violates due process").

Here, plaintiff has pleaded that the statutes mandate $500 in statutory damages for each unsolicited telephone solicitation he received. Such an award is wholly out of proportion to the actual damages any recipient might suffer. The relatively minor inconvenience of deleting the message from an answering machine or hanging up on a telephone call is virtually cost-free. Even the cost of receiving an unsolicited facsimile message is only a few cents. *Destination Ventures, Ltd v. Fed. Communications Comm'n*, 46 F.3d 54, 56 (9th Cir. 1995) (suggesting that the costs of a fax is between 3¢ to 40¢ per page, therefore even if the average fax costs the recipient 40¢, mandated damages under these statutes are 1,250 times the actual harm suffered ($500 ÷ 40¢)). If the cost of receiving an unsolicited facsimile were extrapolated as a means of quantifying the cost of receiving an unsolicited telephone solicitation, then one could quantify each unsolicited telephone call at less than 3¢ to 40¢. Imposing such a grossly excess penalty for conduct causing so little harm violates due process.

Tucker involved a Kansas statute that imposed $500 in damages against a railroad each time it charged a shipper in excess of the statutory maximum rate. Tucker had been overcharged $3.02. The United States Supreme Court held:

> It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. . . . What the statute does is to authorize a recovery of $500 in every case, whether the shipment be of one barrel, or of ten or twenty-five barrels, or of a tank car. . . . In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1/150th of the authorized recovery.

230 U.S. at 348-49. The Court concluded that the $500 statutory damages "is not only grossly out of proportion to the possible actual damages but is so arbitrary and oppressive that its enforcement would be nothing short of a taking of property without due process of law." *Id.* at 3351. Plaintiff may argue that the damages compensate his "mental anguish", but mental anguish damages are not available based upon a civil penalty in Texas, only for "serious bodily injury" or the like. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 95 (Tex.App.--Houston [14th Dist.] 1998, pet. denied)

As in *Tucker*, plaintiff here claims, according to its Petition, that these statutes impose damages of $500 per violation regardless of actual harm caused. As in *Tucker*, these claimed mandatory damages bear no rational relation to actual damages. Plaintiff cannot claim the damages are mental anguish damages, because he has suffered no personal injury. Unlike *Tucker*, however, the ratio of statutory to actual damages claimed by plaintiff under theses statutes is not 150 to 1, but more than 1250 to 1. *Tucker* teaches that such a damage award is unconstitutionally excessive.

Equally persuasive is *Hale v. Morgan*. 22 Cal. 3d 388, 584 P.2d 512 (1978). In *Hale*, the California statute required a mandatory per diem penalty of $100 for each day a landlord shut off a tenant's utilities. The statute permitted the trier of fact no discretion in setting the penalty, even though there might be "widely divergent injury resulting in damage to the tenant." 22 Cal.3d at 399,

584 P.2d at 519. In addition, the penalty multiplied unfailingly each day: "The exercise of reasoned discretion is replaced by an adding machine." *Id.* at 402. In *Hale,* the mandatory penalty had multiplied to $17,300, while the tenant paid the landlord only $65 per month in rent. The California Supreme Court found this penalty "constitutionally excessive" in light of the rent and the value of the trailer park owned by the defendant. *Id.* at 405.

The excessiveness of such presumed damages is obvious not only from due process cases, but also from punitive damages cases. The common law does not tolerate a punitive damage award 1,250 times actual damages. *See, e.g. TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 478-78 (1993) (O'Connor, J., dissenting) (citing cases); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377-78 (5th Cir. 1982) (en banc) (a "formula of punitive damages equal to three times compensatory damages is a fairly good standard against which to assess whether a jury abused its discretion"). Nor would such a punitive award be viable as a matter of federal due process. *Pac. Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 23 (1991) (punitive damage award four times compensatory damages was "close to the [constitutional] line"). In *TXO,* the plurality noted the "shocking disparity" of a punitive award 526 times compensatory damages. 509 U.S. at 461-62. The Court sustained the punitive damages there only because the ratio of punitive damages to potential harm was on the order of 1:1 to 10:1. The plurality found that such a ratio does not "'jar one's constitutional sensibilities.'" *Id.* (quoting *Haslip*, 499 U.S. at 18).

Moreover, punitive damages are only available as punishment for "reprehensible conduct," evincing "fraud, actual malice, violence, or oppression." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Molzof v. United States*, 502 U.S. 301, 307 (1992). In contrast, plaintiff asserts that

these statutes impose $500 in punishment for conduct that causes, at most, 40¢ of harm without any showing of fraud, maliciousness, or any other type of wrong doing that would justify an award of punitive damages. Because punitive damages that are at least 1250 times actual damages would "jar[] one's constitutional sensibilities," the $500 per telephone solicitation award cannot possible be upheld. The $500 per telephone solicitation fixed damages under the Texas and Federal statutes violates due process on their face.

B. Under the Texas Constitution.

The Texas due course of law guaranty has independent vitality. *In re J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994). The due course of law provision of the Texas Constitution differs from the Due Process Clause of the Fourteenth Amendment in two important respects: (1) it directly grants affirmative rights, and (2) it expands due process protection beyond "life, liberty, or property" to include "privileges or immunities, or any other manner in which the citizen may be disenfranchised." *Tex. Workers' Comp. Comm'n v. Garcia*, 862 S.W.2d 61, 74 (Tex. App.– San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995).

The due course of law provision of the Texas Constitution breathes life into the due process rights of Texas citizens because "[i]n contrast to the federal constitution, substantive due process remains a vital doctrine under the Texas constitution." *Garcia*, 862 S.W.2d at 75. Under the Texas Constitution, a damage award violates substantive due process where the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable. *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980). As discussed above in relation to the Federal Constitution, that is the case here where the penalty is 1,250 times any actual harm. Because

plaintiff's claims, depend on a state statute – section 35.47(g) – the Texas Constitution limits the damages that may be awarded under either claim. Thus, section 35.47's damage provisions are unconstitutional under both the Federal and Texas Constitutions.

CONCLUSION

For these reasons, EchoStar respectfully moves the court to grant its Motion for Summary Judgment because (i) plaintiff has no evidence that any Dish Retailer is an agent of EchoStar; (ii) EchoStar's evidence demonstrates that no Dish Retailer is an agent of EchoStar; (iii) plaintiff has no evidence that EchoStar was the entity "on whose behalf" any of the telephone calls were made; (iv) EchoStar's evidence proves that EchoStar was not an entity "on whose behalf" any telephone call was made; (v) as a matter of law, EchoStar may not be held jointly and severally liable for the acts of other defendants; (vi) based upon the plain language of the facts alleged, the alleged telephone calls do not violate the Texas statute; (vii) as a matter of law, the Federal statute only applies to interstate telemarketing activities and does not apply to the acts alleged by plaintiff; (viii) as a matter of law, the Telephone Consumer Protection Act does not apply to common carriers on the facts alleged here and plaintiff alleges that EchoStar is a common carrier; (ix) the mandatory statutory damages in the Federal and Texas statute violate the Texas and Federal Constitution.

Respectfully submitted this 24 day of January 2002.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document was served upon the following parties in accordance with the Texas Rules of Civil Procedure, on this the 24 day of January, 2002.

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